7 PERC ¶ 14245

CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES

California Public Employment Relations Board

Union of American Physicians and Dentists, Charging Party, v. State of California (Department of Developmental Services), Respondent. Union of American Physicians and Dentists, Charging Party, v. Public Practice Bureau/California Medical Association, Respondent.

Docket Nos. S-CE-21-S, S-CO-1-S

Order No. 344-S

September 12, 1983

Before Gluck, Chairperson; Tovar and Burt, Members

Interference -- Employee Organizations -- Formation -- -- 22.1, 22.6, 73.111, 73.115 Although evidence showed that professional association of physicians attempted to create labor organization to compete with existing union, which was seeking to represent unit of state-employed physicians, podiatrists and dentists, and retained *de facto* control of organization so that organization could not be distinguished from association, whose membership was limited to physicians, including supervisors of some employees in unit, charge that organization unlawfully permitted professional association to direct or influence its activities was dismissed. Despite connections between association and labor organization it sought to create, organization was "employee organization" within meaning of SEERA. Thus, relationship between two entities was not, in and of itself, unlawful, and did not tend to interfere with employees' exercising their protected rights.

APPEARANCES:

Philip Paul Bowe, Attorney (Davis, Cowell & Bowe) for the Union of American Physicians and Dentists; David L. Suddendorf, Attorney (Hassard, Bonnington, Rogers & Huber) for the Public Practice Bureau/California Medical Association.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Public Practice Bureau/California Medical Association (PPB/CMA) to the Administrative Law Judge's (ALJ) proposed decision finding that the PPB/CMA interfered with employee rights in violation of subsection 3519.5(b) of the State Employer-Employee Relations Act (SEERA or Act)1 by virtue of the organizational relationship between the CMA and the PPB [see 6 PERC 13119 (1982)].

In May of 1980, the Union of American Physicians and Dentists (UAPD) filed charges alleging that the State of California, Department of Developmental Services (State or Department) violated subsection 3519(d) of SEERA2 by granting special privileges to the PPB/CMA. The UAPD also filed charges against the PPB/CMA itself, claiming that it violated subsection 3519.5(a) by deceiving the State into granting special benefits to the CMA while it was organizing state employees through the PPB, so that privileges were unavailable to the PPB/CMA which were not available to the UAPD. The UAPD further alleged that the PPB/CMA had violated subsection 3519.5(b), by interfering with employee rights by including employees to sign authorization cards through the use of misstatements about employee rights under SEERA.

The ALJ dismissed all charges against the State. He found that the State had acted reasonably in dealing with the PPB initially as if it were any other labor organization. When the State found out that the CMA was intimately involved with the PPB, it discontinued all special privileges granted to the CMA.

The ALJ did not explicitly dismiss the section 3519.5(a) charge, that the PPB/CMA caused or attempted to cause the State to violate section 3519, although he apparently found no violation of this section.

In its response the UAPD does not except to the ALJ's dismissal of the subsection 3519(d) charges against the State or his failure to find that the PPB/CMA violated subsection 3519.5(a) by causing the State to violate SEERA, although it does allude to those allegations in defense of the ALJ's decision. Therefore these matters are not before us on appeal.

The ALJ found that the PPB/CMA had violated subsection 3519.5(b) by interfering with the right of employees to be represented by a legitimate labor organization. The PPB/CMA excepts to this conclusion. The UAPD filed a response to exceptions in which it defended the ALJ's finding of violation.

We have reviewed the entire record in light of these exceptions and the UAPD's response. For the reasons outlined below, we reverse the ALJ and dismiss all charges against the PPB/CMA.

FACTS

In November 1979, PERB established statewide bargaining unit #16, comprised of approximately 1200 state-employed physicians, podiatrists and dentists. On December 10, 1979 the Union of American Physicians and Dentists filed a petition requesting a representation election in that unit.

Because of a number of problems in the state hospitals, in the fall of 1979 the California Medical Association had established a liaison committee to state hospitals, consisting of one doctor from each state hospital plus several CMA physicians, and a CMA task force on state hospitals. The purpose of these groups was to look into the quality of health care in these hospitals. The past president of the CMA, Dr. Charles J. Tupper, testified that in the course of studying the conditions in state hospitals, it became clear to the CMA that physicians were unable to be as effective as they might be. The CMA began to consider a mechanism for these doctors to bargain, not only about wages and hours, but about patient care.

In December of 1979, the Executive Committee of the CMA recommended that the CMA Council:3

> submit appropriate resolution/by-law amendments to the 1980 House of Delegates to create a unit within the CMA which can serve as a collective bargaining agent for publicly employed physicians.

n early January of 1980, the CMA Council authorized the Executive Committee to submit resolutions and by-law amendments to the CMA House of Delegates regarding the creation of a "unit within the CMA which can serve as a collective bargaining agent for publicly-employed physicians."

Pursuant to that authorization, on February 9, 1980, a committee of the CMA House of Delegates recommended the adoption of a by-law amendment to create a collective bargaining authorization to be known as the Public Practice Bureau. That by-law amendment was subsequently adopted by the delegates at their February meeting.4

Dr. Tupper testified that the CMA had become aware that it could not maintain its identity as a professional association and serve as a collective bargaining representative at the same time. Also, the unit included podiatrists and dentists employed by the state, while membership in the CMA is open only to physicians. The CMA had therefore determined to set up the PPB as an independent entity, as reflected in the by-law adopted.

After the adoption of the by-law amendment, the CMA formed a steering committee for the new

organization consisting of CMA members who were not state-employed physicians. The chairman of the steering committee was the chairman of the CMA's liaison committee to state hospitals. Under the direction of the steering committee, the CMA staff, particularly Jack Light, began actively soliciting authorization cards on behalf of the "Public Practice Bureau of the California Medical Association." The CMA was acting under some time pressure, since the UAPD had petitioned for an election and intervention had to be made by February 27.

As part of the solicitation for authorization cards, the CMA sent mailgrams soliciting support for the PPB to members of its liaison committee on state hospitals. These mailgrams contained this message: "If CMA's Public Practice Bureau does not qualify by February 27, UAPD could be decreed as the representative without an election."

A CMA staff member testified that this erroneous information was given to him by phone by a PERB employee. This mailgram was also sent to presidents of component medical societies (district organizations) of the CMA and medical executives of state hospitals.

One of these mailgrams was read by Dr. Mabius, the Chief of Professional Education at Camarillo State Hospital, at a regularly scheduled staff meeting attended by approximately 50 physicians on February 20, 1980.5

Other letters were sent to members of the unit requesting support, but not containing the phrase quoted above. The PPB/CMA garnered sufficient support to file a timely intervention on February 27. The California State Employees Association also intervened on that day.

The CMA liaison committee held its regular meeting on March 14, 1980. At a meeting immediately following that of the liaison committee,6 in the same hotel, by-laws for the PPB were circulated by CMA staff members and signed by six physicians.

These by-laws provided that PPB would be a labor organization open to state-employed physicians, dentists and podiatrists, and that it would be autonomous, with no official CMA representation. The PPB Executive Board first met on March 22, 1980.

Paul Strobel, a staff member for the CMA, became the PPB's only paid employee in late March, working part time for the CMA and part time for the PPB. As of the hearing date in October, his time was split half and half between the two. His check was paid in full by the CMA, with the portion attributable to the PPB charged against its line of credit, as described below.

On March 31, 1980, the CMA deposited $90.00 in a bank account created by it for the PPB. Strobel testified that this amount represented dues that had been collected. On April 12, 1980, the CMA Council issued a $29,250 "line of credit" to PPB, against which PPB's bills were charged. The letter to the PPB containing this approval noted that, "Because of uncertainty surrounding the time when PPB will become self-supporting, Council would look favorably to an extension, if this becomes necessary." Expenses were charged against this credit retroactive to March 1. These expenses included copying and postage provided by the CMA, office space rental in an office adjacent to that of the CMA, travel expenses for board meetings, etc., as well as Strobel's salary. The PPB was billed monthly for these charges, which were then applied against the line of credit.

The PPB had requested the loan interest-free, but it was offered at 7 percent interest for two years. A memo from the CMA on September 16 indicated that the PPB would exceed its line of credit by the end of September because the PPB had already spent over $25,000, which "amounts do not include $19,711 in legal fees absorbed by the CMA." At the time of the hearing in October of 1980, the PPB was negotiating with the CMA for additional credit, and there was no evidence of any other income to the PPB.

On February 22, 1980, after learning that the CMA/PPB was soliciting support, the Department of Developmental Services issued a memorandum to its Executive Directors to the effect that since CMA was now operating as a labor union, it should be treated as such, and no longer offered the special treatment given a professional organization. Before the issuance of this memo, state-employed physicians received time off for attending CMA meetings and reimbursement for

some expenses connected with those meetings. Mail sent to CMA members at state facilities was delivered to the members' personal boxes, rather than simply placed in a big box like other mail from employee organizations. Further, the CMA participated in accreditation committees reviewing conditions at state hospitals.

When the meeting of the liaison committee was held on March 14, at least one hospital director responded to the CMA that a physician would no longer be assigned to the liaison committee since the CMA was to be treated as a labor organization. It is unclear from the record whether any payments were made by the state for expenses or if any released time was granted in connection with this meeting.

The Department followed up its February 22 memo on March 17, reminding hospital executive directors to deny all requests for state time and expenses for staff to attend training courses offered by a number of employee organizations, including the CMA.

Throughout March and April, the CMA and the Department exchanged correspondence on the issue of whether the CMA was or was not a labor organization. The Governor's Office of Employee Relations issued a memorandum on July 7, 1980 in which it agreed that the CMA and the PPB were one organization.

The UAPD filed charges in May of 1980 against the Department and the PPB/CMA. The charges were consolidated for hearing which commenced in October of 1980.

The representation record in this case reflects that the PPB/CMA originally petitioned for intervention in the name of the "Public Practice Bureau of the California Medical Association," to which the UAPD objected. By stipulation with the UAPD in May, the PPB agreed to drop the notation of affiliation with the CMA on the ballot in return for the UAPD's agreement to drop its challenge to the employee organization status of PPB/CMA. In February of 1981, the PPB/CMA withdrew its intervention stating that it had affiliated with CSEA. In March of 1981, the UAPD signed a "Request to Proceed" requesting PERB to proceed with the election even though there were charges outstanding, and waiving the right to object to the election based on the same conduct as that alleged in these charges. The election was conducted in May of 1981, and the UAPD was certified as the exclusive representative for Unit 16.

DISCUSSION

The central objection raised by the PPB/CMA is to the ALJ's conclusion of law that the course of conduct pursued by the CMA and the PPB resulted in harm or potential harm to employee rights. The language in subsection 3519.5(b) of SEERA makes it unlawful for an employee organization to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

In interpreting identical language in subsection 3543.6(b) of the Educational Employment Relations Act (EERA), the Board noted that this language is the same as that covering employer conduct in subsection 3543.5(a) and found it appropriate to analyze those sections in the same way. Therefore, in order to establish a *prima facie* case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. *Los Angeles Community College District* (Kimmett) (10/19/79) PERB Decision No. 106, 3 PERC 10134. *Carlsbad Unified School District* (1/30/79) PERB Decision No. 89, 3 PERC 10031. We find that the same analysis is appropriate under subsection 3519.5(b) of SEERA.

Under SEERA, employees' protected rights are enumerated in sections 3512 and 3515. Section 3512 recognizes:

> . . . the right of state employees to join organizations of their own choosing and

> be represented by those organizations in their employment relations with the state. . . .

Section 3515 states:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

Following the *Carlsbad* approach suggested by *Kimmett,* a connection must be demonstrated between the PPB's conduct and the exercise of a protected right resulting in harm or potential harm to that right. That is, it must be shown that the PPB's conduct harmed the protected rights of state employees.

The charge alleging a violation of 3519.5(b) filed against the CMA/PPB alleges that it interfered with employee rights by its misstatement (included in the telegram Dr. Mabius read at the meeting at Camarillo) to the effect that unless the PPB qualified, it would be possible for PERB to designate the UAPD as the representative organization without holding an election.

This was presumably a misstatement because an election would be held under any circumstances, and employees would have the right to choose a representative or to choose no representative.

Aside from finding that this incident did occur, the ALJ does not deal further with the allegation that the statement is inaccurate. It is not clear what effect there was on employee rights in any case, since the authorization cards were used only to intervene, the UAPD did not challenge the PPB/CMA's showing of interest, and the UAPD won the election.

The ALJ appears to find a violation on the basis of the fact that the PPB was dominated by the CMA, which was not itself able to be a labor organization. That conclusion certainly supports the State's action in withdrawing the preferential treatment accorded the CMA, but it does not necessarily independently constitute an interference with employee rights.

The ALJ also suggests that the PPB's operation as a labor organization "did not conform to the definition contained in the Act." Section 3513(a) of SEERA defines an employee organization as "any organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state." The PERB certainly meets this minimum standard, regardless of its relationship with the CMA.

Certainly the charging party was a creature of the CMA from evidence to find that the PPB was a creature of the CMA from its inception, and that the PPB never operated as an independent entity, despite the CMA's claims to the contrary. Nevertheless, neither the charging party nor the ALJ has cited cases before this Board or under the federal law to support the proposition that the relationship between the CMA and the PPB was, in and of itself, unlawful or tended to interfere with employees because of the exercise of their rights under SEERA.

For those reasons, we reverse the ALJ's conditions of law, and dismiss all charges against the PPB/CMA.

ORDER

Upon the foregoing Decision, and the entire record in this case, it is hereby ordered that the unfair practice charge in case No. S-CO-1-S be DISMISSED.

Chairperson Gluck and Member Tovar joined in this Decision.

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[1] SEERA is codified at Government Code section 3512 *et seq.* All statutory references are to the Government Code unless otherwise specified.

Section 3519.5 states in pertinent part:

It shall be unlawful for an employee organization to:

a) Cause or attempt to cause the state to violate section 3519.

b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2] Section 3519(d) states:

It shall be unlawful for the state to:

. . .

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[3] The House of Delegates of the CMA is the general body which meets yearly; the Council is a representative group that meets monthly to transact business between meetings of the House of Delegates; the Executive Committee is comprised of the officers of the CMA.

[4] Public Practice Bureau, By-laws Amendment No. 8-80, Committee G.

RESOLVED: That Chapter XII of the Bylaws of this Association be amended by renumbering Chapter XII as Chapter XIII, and successive chapters successively to maintain continuity and by adding the words in italics which will be read as follows:

Chapter XII - Public Practice Bureau

Section 1. Public Practice Bureau. The Public Practice Bureau, in addition to the other purposes of this Association, shall represent publicly employed physicians and other health care professionals with respect to wages, hours and other terms and conditions of public employment. One of the primary purposes of the Public Practice Bureau shall be representing physicians and other health care professionals employed by the State of California in their relations with the State. Membership in the California Medical Association shall not be a prerequisite for membership in the Public Practice Bureau.

[5] As noted by the PPB/CMA, Dr. Mabius is identified in the record only as the Chief of Medical Education at Camarillo. There is no further evidence to show his relationship with CMA or the PPB.

[6] The PPB/CMA correctly notes by way of exception that in his decision the ALJ apparently confused this meeting with another meeting at Camarillo. The ALJ also suggests that the by-laws for the PPB were signed at the liaison committee meeting itself, instead of at a separate meeting thereafter as witnesses testified. These errors are non-prejudicial in any case, since they involve only one incident demonstrating the close relationship between the CMA and the PPB, a fact otherwise amply demonstrated by the record.